he had departed from the county of his residence, and voluntarily gone within and continued within the lines of the Confederate States. The evidence establishes the truth of these allegations.

It does not matter that Thomas remained at home until the advance of Bragg's troops brought him within the lines of the invading army. He continued a non-combatant citizen of Kentucky, until the Confederates left Lexington on their retreat from the state. Whether his remaining at home until the day after the Southern troops had retired, brought him again within the military lines of the advancing Federals, or whether his home continued constructively within the Southern lines until the Union troops actually re-occupied the country, we do not deem it necessary to decide. He left his home when there was no public enemy present to interfere with the execution of the process of the courts, and by voluntarily continuing absent and within the hostile lines, he forced his creditors to resort to the remedies provided by a law enacted before he was in any way connected with the Confederate army.

His conduct brought him within the letter as well as the spirit of the law, construing it as strictly and confining its operation within the narrow limits insisted upon by his learned counsel. The judgment of the Circuit Court dismissing appellant's petition must be affirmed.

This cause was decided by Judge PRYOR whilst a circuit judge, hence he took no part in this judgment.

District Court of the City of Philadelphia.

MOUNTJOY TO THE USE OF HOLBROOK *v.* METZGER.

Where a contract is to be performed on a certain day, an unqualified refusal of performance, during any part of that day, is a breach, and the other party may recover his damages.

Suit for the breach, commenced on the same day but after the refusal to perform, is not premature.

THIS was an action of *assumpsit* on a written contract of sale, by which Mountjoy agreed to deliver and Metzger to take and pay for 500 barrels of petroleum "between April 14th and December 31st 1869, both days included, at buyer's option," at 38½ cents per gallon.

Mountjoy subsequently assigned his interest in the contract to Holbrook. The buyer did not exercise his option, and the agreement consequently became absolute on his part to accept and pay for the oil on the 31st of December. On that day Holbrook tendered the oil to the defendant. The price had fallen, and the tender was peremptorily declined. Metzger said that Mountjoy was in prison and could not have fulfilled the agreement if oil had risen. He could not, therefore, reasonably expect the defendant to comply. The tender was all right, but he, Metzger, would neither take the oil nor pay the difference. Holbrook then said that he supposed he was bound to sell the oil at auction. If, however, the defendant was willing, he would place it in the hands of Mr. Foster, to be disposed of at private sale. Metzger replied that he had no objection. Holbrook thereupon sold the oil at once through Foster for 31¼ cents per gallon, and this suit was instituted to his use on the same day, for the difference between this amount and the contract price.

The jury were instructed that the writ was prematurely issued, unless the defendant had waived his right as originally fixed by the agreement. If, however, he refused absolutely to take the oil, and assented to the defendant's suggestion that it should be sold forthwith, as a means of liquidating the damages and fixing the rights and liabilities of the parties, the cause of action was complete immediately on the sale, and a suit brought subsequently on the same day would not be too soon. Under this instruction the jury found a verdict for the plaintiff. This was now a rule for a new trial.

J. T. Pratt and *R. P. White*, for plaintiff.

J. H. Sloan and *John Goforth*, for defendant.

The opinion of the court was delivered by

HARE, P. J.—The charge was excepted to, and is now before us for consideration. It is said on behalf of the defence that when an agreement is made for the sale of merchandise deliverable at a future day, the purchaser has the whole of the day to accept and pay for the goods, and the vendor to deliver them. Hence the contract cannot be broken on either side before night, and a writ issued on the same day is premature.

The plaintiff replies, that while this is true as a general proposition, still a declaration that the purchaser will not accept or pay

for the goods is a breach for which redress may be sought immediately by suit.

The question was critically examined in *Hochster* v. *De la Tour*, 2 Ell. & Bl. 678. The declaration averred a mutual agreement on the 12th of April 1852, that the plaintiff should serve the defendant as a courier for three months from a certain day then to come, to wit, the 1st of June 1852. That the plaintiff was ready and willing to comply with the agreement, but that the defendant afterwards, and before the said 1st of June, wrongfully refused and declined to employ the plaintiff, and wrongfully absolved and discharged him from the said agreement and from the performance thereof, and from being ready and willing to fulfil the same; and that the defendant then and there wholly broke, put an end to, and determined his said promise and engagement. It appeared, from the evidence given at the trial, that the agreement was made as alleged in the declaration. That on the 11th of May 1852, the defendant wrote to the plaintiff that he had changed his mind and would not take the plaintiff into his service. The latter thereupon brought suit on the 22d of May, and subsequently, during the same month, obtained an engagement with Lord Ashburton, on equally good terms, but not commencing until the 4th of July. The defendant contended the suit was prematurely brought, if not radically defective. There could not be a breach before the time designated for performance, nor could a contract be enforced by any one who did not hold himself in readiness to fulfil his part. By taking an engagement from Lord Ashburton in May the plaintiff had disabled himself from entering the defendant's service on the 1st of June.

Mr. Justice ERLE reserved the point; and the case was subsequently argued before the court in banc, on a rule to show cause why a nonsuit should not be entered or the judgment arrested. The defendant's counsel alleged that to constitute a breach of contract something must be left undone which the promissor agreed to do, or something done which he promised to avoid. Saying beforehand that he does not intend to fulfil the agreement, is not a breach, because he may change his mind when the time for performance arrives. The injury inflicted by the defendant's declaration that he would not employ or pay the plaintiff, was prospective, not actual, and could not be made the foundation of a suit. The plaintiff was entitled to nothing under the contract

until the day appointed for its fulfilment. In reply, the plaintiff's counsel insisted on the hardship that would result if a vendor who agrees to deliver goods at a future day were obliged to hold them in the face of a falling market, notwithstanding a notice that the buyer would not fulfil the contract; or if a manufacturer who has entered on the fulfilment of an order which is unjustifiably revoked, must proceed on pain of forfeiting the right to compensation for what he has already done.

Lord CAMPBELL said, in delivering judgment, that it was established under the authorities, that if a man disabled himself from performing the contract, although before the time appointed for its fulfilment, there was a breach for which the other party might proceed forthwith. The law had been so held where a man who had promised to marry at a future day, took another woman as his wife during the interval. So a tenant might sue at once if the landlord precluded the fulfilment of his promise to renew the lease, by letting the premises to a third person before the expiration of the term.

The principle was analogous where the refusal of one party to perform the contract, took away the only ground on which the other could reasonably be expected to hold himself in readiness to fulfil his part of the agreement. An author who had promised to write a book could not be expected to go on with the work, after being informed that the publisher would not defray the cost of printing it or pay the stipulated compensation. In like manner the plaintiff could not justly be required to keep himself disengaged in order to be able to attend on the defendant, after being told that the latter did not need and would not accept his services. It was obviously for the interest of both parties—of the party who refused to fulfil the contract, and of the party to whom the refusal was addressed—that the latter should be permitted to reduce the damages by taking his skill and time to the best market instead of charging the other with the whole weight of the obligation which he had renounced. The same principle was applied in *Zenos* v. *The Black Sea Co.*, 18 C. B., N. S. 825.

These decisions go further than the plaintiff's case requires. The verdict may be sustained without holding that a contract is necessarily broken by a declaration that it will not be fulfilled. It is enough to say, that a breach will occur, if such a declaration results in a loss for which compensation should be made in dam-

ages. It may well be, that a purchaser who has announced that he will not pay the price, may change his mind and claim the goods if they are still on hand when the day arrives, and susceptible of being delivered. If this is conceded, it must follow that such a retraction on his part would preclude a recovery by the vendor, who could not be entitled to damages in the absence of loss. But the case is widely different where the goods are sold in consequence of the purchaser's declaring that he does not want and will not pay for them. The transaction is then brought to a point which does not admit of change; and as the damages are liquidated, it would obviously be unjust to delay the remedy. This argument applies with peculiar force when the purchaser rejects the goods when tendered at the time prescribed.

It cannot be said that such a refusal is a mere declaration of intention as distinguished from an actual breach. It is no doubt true that the parties have the whole of the last twenty-four hours during which to perform the agreement. Hence a buyer to whom the goods are offered at noon, may require the vendor to keep them in readiness till night, to give him time to procure and pay the purchase-money. But an unqualified refusal on his part is an irreparable breach which leaves no room for a subsequent change of purpose. It is an implied authority to the vendor to dispose of the property to the best advantage, and charge the purchaser with the difference.

In the present case, however, we are not left to inference, because the question, whether the goods should be sold at private sale, was put to the defendant and answered affirmatively. He is therefore estopped from alleging that it was the duty of the plaintiff to wait till the next day before treating the contract as determined.

A question remains of some importance. Conceding that the contract was irrevocably broken, by the refusal of the defendant to take the oil, could the plaintiff sue at once, or was he bound to wait until the following day? If the first impression is in favor of the necessity for delay, it will, I think, disappear on investigation. It is no doubt true in general, that a suit will not lie on the day on which default is made in the performance of a pecuniary obligation. The cause of action is not complete on a promissory note until the morning after the last day of grace; and the principle is the same in the case of a bond. This is not because a man who is injured cannot seek redress immediately by suit, but because non-perform-

ance is not an injury until the time for fulfilment has expired. If a man removes or converts the goods of another the latter may proceed at once in trover or replevin; and so where a vendor refuses to deliver the goods notwithstanding a tender of the price. In like manner a man who should promise to pay a sum certain at noon on a given day, could not complain that a writ issued the next hour was premature. It follows that when a purchaser refuses absolutely to accept or pay, the vendor may proceed forthwith in debt or *assumpsit*. The rule that there are no parts of a day is designed like other legal fictions for the furtherance of justice, and does not apply, where the effect would be to frustrate or delay an undoubted right. It is distinctly in proof that the plaintiff did not issue the writ until the damages were liquidated by the sale of the oil; but if it were needful this might be presumed in aid of the remedy, and to obviate the expense and delay of another suit.

Since the above was written our attention has been called to the case of *Frost* v. *Knight*, L. R. 7 Exch. 111. It was an action for a breach of promise of marriage. The defendant who had agreed to marry the plaintiff whenever his father died, declared during the lifetime of the latter, that he was unalterably determined not to fulfil the contract, and it was held by the Exchequer Chamber (reversing the judgment of the court below), that the plaintiff might regard the promise as broken, and sue for and recover such damages as would have arisen from the non-fulfilment of the agreement at the time prescribed, subject to abatement in respect to any circumstances that might have afforded a means of mitigating the loss. The doctrine may therefore be regarded as established in England, and from its intrinsic reasonableness, will, in all probability, prevail in the United States.

The rule for new trial is discharged.

Supreme Court of New York.

MATTER OF THE SECOND AVENUE RAILROAD COMPANY.[1]

An act of the legislature granting to a passenger railroad company the right to extend its tracks over certain additional streets in the city of New York provided

[1] The following report, though not strictly a judicial decision, discusses some novel and interesting points in regard to the rights of municipal corporations, their control over their streets and the franchises of city passenger railways. We print it in accordance with the desire of several correspondents.—ED. A. L. R.